January 14, 2022

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Johnson Jacques**
Tax Registry No. 947923
Criminal Justice Bureau
Disciplinary Case No. 2018-19665

The above named member of the service appeared before Assistant Deputy Commissioner Josh Kleiman on May 13 and 14, 2021 and was charged with the following:

DISCIPLINARY CASE NO. 2018-19665

1. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about August 2012, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant obstructed the breathing of Ms. [redacted] and punched her. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	**PUBLIC CONTACT – PROHIBITED CONDUCT**
NYS Penal Law 121.11(1)	**CRIMINAL OBSTRUCTION OF BREATHING OR BLOOD CIRCULATION**

2. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about November 2012, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant punched Ms. [redacted] (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	**PUBLIC CONTACT – PROHIBITED CONDUCT**
NYS Penal Law 120.00 (1)	**ASSAULT IN THE THIRD DEGREE**

3. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about and between September 2013 and October 2013, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant threatened to kill himself and Ms. [redacted] (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	**PUBLIC CONTACT PROHIBITED CONDUCT**
NYS Penal Law 120.15	**MENACING IN THE THIRD DEGREE**

4. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about November 2013, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant punched and kicked Ms. [redacted] resulting in injuries to her nose and eye. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	**PUBLIC CONTACT – PROHIBITED CONDUCT**
NYS Penal Law 120.00 (1)	**ASSAULT IN THE THIRD DEGREE**

5. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about July 2014, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant pushed Ms. [redacted] into a wall. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	**PUBLIC CONTACT – PROHIBITED CONDUCT**
NYS Penal Law 120.00 (1)	**ASSAULT IN THE THIRD DEGREE**

6. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about July 27, 2015, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant displayed a firearm during an argument with Ms. [redacted]

P.G. 203-10, Page 1, Paragraph 5	**PUBLIC CONTACT – PROHIBITED CONDUCT**
NYS Penal Law 120.15	**MENACING IN THE THIRD DEGREE**

7. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about and between January 2016 and October 2017, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant threatened Ms. [redacted] several times. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT**

NYS Penal Law 120.15 — **MENACING IN THE THIRD DEGREE**

8. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about and between August 1, 2012 and October 8, 2017, having been involved in an off-duty incident, did fail and neglect to report said incident to the Patrol Supervisor, Precinct of occurrence. (*Dismissed*)

P.G. 212-32, Page 1, Paragraph 2 — **OFF-DUTY INCIDENT INVOLVING UNIFORMED MEMBERS OF THE SERVICE**

9. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about February 16,2018 and February 18, 2018, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant was present inside the 113th Precinct to a Domestic Incident Report prepared on his behalf and failed to identify himself as an off-duty Member of Service to on-duty Members of Service. (*Dismissed*)

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT**

In a Memorandum dated July 13, 2021, Assistant Deputy Commissioner Josh Kleiman found Police Officer Jacques guilty of Specification No. 6 and not guilty of the remaining specifications, in Disciplinary Case No. 2018-19665. Having read the Memorandum and analyzed the facts of this matter including all the relevant evidence, I approve of the findings, but disapprove the penalty.

I carefully considered that Police Officer Jacques has had an otherwise unblemished career with highly favorable reviews and has not been the subject of any further formal discipline since the single incident in 2015, for which he was found guilty. I also noted that Police Officer Jacques was previously demoted from the rank of Sergeant in connection with this incident. In light of the aforementioned, I have determined that a deviation from the Disciplinary System Penalty Guidelines is warranted in this matter.

Therefore, I direct that an ***immediate*** post-trial settlement agreement be implemented with Police Officer Jacques in which he shall forfeit thirty (30) suspension days without pay (already served), be placed on one (1) year dismissal probation, and complete the 24-week domestic violence counseling.

If Police Officer Johnson Jacques does not agree to the terms of this post-trial negotiated settlement as noted, this Office is to be notified without delay.

Keechant Sewell
Police Commissioner

POLICE DEPARTMENT

July 13, 2021

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2018-19665
Police Officer Johnson Jacques	:	
Tax Registry No. 947923	:	
Criminal Justice Bureau	:	

At:	Police Headquarters One Police Plaza New York, NY 10038
Before:	Honorable Josh Kleiman Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:	Kathryn Falasca, Esq. Department Advocate's Office One Police Plaza New York, NY 10038
For the Respondent:	Roger Blank, Esq. 136 Madison Avenue, 6th Floor New York, NY 10016

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Said Sergeant[1] Johnson Jacques, currently assigned to the Manhattan Court Section, on or about August 2012, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant obstructed the breathing of Ms. [redacted] and punched her. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 121.11(1)	CRIMINAL OBSTRUCTION OF BREATHING OR BLOOD CIRCULATION

2. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about November 2012, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant punched Ms. [redacted] (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 120.00(1)	ASSAULT IN THE THIRD DEGREE

3. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about and between September 2013 and October 2013, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant threatened to kill himself and Ms. [redacted] (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 120.15	MENACING IN THE THIRD DEGREE

4. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about November 2013, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant punched and kicked Ms. [redacted] resulting in injuries to her nose and eye. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 120.00(1)	ASSAULT IN THE THIRD DEGREE

[1] Respondent was demoted to the rank of police officer on August 3, 2019.

5. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about July 2014, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant pushed Ms. [redacted] into a wall. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 120.00(1)	ASSAULT IN THE THIRD DEGREE

6. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about July 27, 2015, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant displayed a firearm during an argument with Ms. [redacted]

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 120.15	MENACING IN THE THIRD DEGREE

7. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about and between January 2016 and October 2017, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant threatened Ms. [redacted] several times. *(As amended)*[2]

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
NYS Penal Law 120.15	MENACING IN THE THIRD DEGREE

8. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about and between August 1, 2012 and October 8, 2017, having been involved in an off-duty incident, did fail and neglect to report said incident to the Patrol Supervisor, Precinct of occurrence. *(Dismissed)*

P.G. 212-32, Page 1, Paragraph 2	OFF-DUTY INCIDENTD INVOLVING UNIFORMED MEMBERS OF THE SERVICE

[2] Specification 7 is further amended by a Bill of Particulars, dated May 6, 2021, in which the Department stated that the alleged threats occurred both in person and over the phone, whereupon Respondent stated, "in sum and substance:"

> I will kill you, I am a Police Officer, I will never be punished because I know how to act and play the system. I will assault you and say I wasn't myself at the time, I will say I thought you were someone else, then I won't go to jail just a mental hospital. You are nothing but a whore and I will kill you and then kill myself. You are a drug user and a prostitute, good luck bringing me to court.

9. Said Sergeant Johnson Jacques, currently assigned to the Manhattan Court Section, on or about February 16, 2018 and February 18, 2018, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant was present inside the 113th Precinct to a Domestic Incident Report prepared on his behalf and failed to identify himself as an off-duty Member of Service to on-duty Members of Service. *(Dismissed)*

P.G. 203-10, Page 1, Paragraph 5 — PUBLIC CONTACT – PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 13 and May 14, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Ms. [redacted] as its sole witnesses. Respondent testified on his own behalf and called his mother, [redacted], and brother, [redacted], as witnesses. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of Specification 6 and Not Guilty of the remaining specifications. In accordance with the Department's Disciplinary Guidelines, I recommend that Respondent be dismissed from the Department.

ANALYSIS

On October 25, 2017, Ms. [redacted] Respondent's ex-girlfriend, filed a family court petition seeking an order of protection, alleging that Respondent had engaged in multiple acts of domestic violence and threatening behavior between August 2012 and October 2017. Upon being served with a copy of the petition and order of protection, Respondent notified the Department of the filings. Each of the seven specifications with which Respondent is charged concerns allegations Ms. [redacted] made in her family court petition. (Dept. Ex. 10B; Tr. 14-15, 512)

Due to the lengthy passage of time between the date Respondent was served with the charges herein adjudged and the incident dates of the alleged misconduct, the Department must, pursuant to Civil Service Law § 75(4), establish that the misconduct alleged would, if proven in a New York criminal court, constitute a crime, in order to overcome the statutory 18-month deadline for the service of charges in a disciplinary matter (hereinafter the "Criminal Exception") (*See Foran v. Murphy*, 342 N.Y.S.2d 4, at 7 [Sup. Ct., NY County 1973] [The Criminal Exception concerns itself with "not whether a crime has in fact been proved, but whether the acts alleged, '*if proved* in a court of appropriate jurisdiction,' would constitute a crime."]) Here, each specification charged sets forth the crime the Department alleges the misconduct would constitute for the purposes of the Criminal Exception. Accordingly, this Tribunal assesses each specification below, as alleged, to determine whether the Criminal Exception has been met. Even if met, this Tribunal must, nevertheless, decide whether the charged misconduct has in fact been proven by a preponderance of the evidence.

Specification 1 – August 2012 – Choking & Punch

At trial, Ms. [redacted] testified that in or about the summer of 2012, during a fight in which Ms. [redacted] accused Respondent of infidelity, Respondent locked the door to their bedroom. While "facing forward in front of him," she stated that he "threw me on my back on the bed," "got on top of me and started choking me," with "both hands on my neck." Upon being choked, Ms. [redacted] who stated she was unable to breathe, banged against the bed's headboard with her hand in the hope that it would alert someone else in the home. According to Ms. [redacted] Respondent's brother, [redacted], heard the banging, broke through the locked bedroom door, and pulled Respondent off her. As a result of the incident, Ms. [redacted] stated that she had a sore throat and bruises on her neck. She did not report the incident at the time. No

evidence was submitted that Ms. [redacted] sought to document or treat her injuries. Ms. [redacted] stated that Respondent later apologized repeatedly and she decided to give him another chance. While Ms. [redacted] did not testify to being punched on direct examination, on cross-examination when asked if she was also punched in the "jaw," she replied, "That's correct." No further testimony was elicited concerning the alleged punch. (Tr. 52-55, 177)

The first time Ms. [redacted] publicly reported the details of this incident was five years later in a family court petition, filed on October 25, 2017, in which she sought an order of protection against Respondent; admittedly, as part of a larger effort to get more court-ordered time with her daughter, who was born in 2015.[3] The description of the incident in the family court petition differed in some respects with the description of the incident provided by Ms. [redacted] at trial. In the petition, signed and verified as true by Ms. [redacted] she stated that Respondent "violently pushed" her "in the back" and that she fell "face first onto the bed." Ms. [redacted] further claimed that she had "bruises under her eye from where he hit her, and bruises on the top of her back from where he pushed her." The summary of the incident set forth in the petition makes no mention of Respondent's brother witnessing the incident or intervening to pull Respondent off her. Ms. [redacted] does describe, however, in the family court petition, that Respondent choked her, causing injuries to her neck, and that she banged on the headboard as a "cry for help." (Tr. 129-30, 175, 247, 249-50, 274, 282, 429-30, 443; Dept. Ex. 10B)

On November 30, 2017, the Department interviewed Ms. [redacted] but at the request of Ms. [redacted] the interview was not recorded. A summary of the interview was prepared by a Department investigator. In the summary, Ms. [redacted] describes being pushed to the bed and choked. The only injury noted is "bruising to her neck." (Resp. Ex. B)

[3] For over a year prior to seeking an order of protection, Ms. [redacted] only saw their daughter on Sundays from 7am to 7pm. During this time period, their daughter was living with Respondent.

At the same interview on November 30, 2017, Ms. [redacted] also completed several Domestic Incident Reports, one of which concerned the August 2012 altercation. When asked to complete a narrative of the incident, Ms. [redacted] wrote:

> Johnson pushed me, I fell on the bed then he choked me with both hands, punch me in the face, I was banging on the headboard for help. His brother [redacted] broke open the door and pull him off me.

(Resp. Ex. A).

Respondent testified that the events set forth in Specification 1, as testified to by Ms. [redacted] never occurred. Instead, he stated that in August 2012 he remembered that she had confronted him about other women with whom he was in contact. Respondent stated that he sat down with her and showed her his phone, explaining each of the relationships to her. He explained that one of the women was his assigned partner at work and the other was a study-partner from high school. While Respondent said that he was not upset when he explained his relationship to these women to Ms. [redacted] he admitted that it was an "argument." (Tr. 424, 460-61)

Respondent called his brother, Mr. [redacted] as a witness. Noelson testified that he had never heard Ms. [redacted] and Respondent in a physical fight, nor had he ever entered a bedroom door to confront them, and he never pulled Respondent off of Ms. [redacted] He further stated that he had never observed any injuries to Ms. [redacted] neck or face. (Tr. 300-301)

During the course of his testimony, Respondent's brother admitted that he has been diagnosed with schizophrenia and is on medication, but stated that it does not affect his cognitive function. No evidence was submitted that [redacted]'s medical condition affected his memory or ability to testify truthfully. Respondent's mother further explained during her testimony that she and Respondent's brother, [redacted] who she cares for, reside at a property owned by

Respondent. Respondent's mother, who is unemployed, stated that she pays Respondent $800 a month in rent, which she partially affords with state benefits she receives. On occasion, she seeks help from her sons to pay rent. [redacted] testified that he is also unemployed and that he occasionally seeks financial assistance from Respondent. (Tr. 302, 304, 323-24, 366-67)

Specification 1 charges Respondent with punching and choking Ms. [redacted] Specification 1, as amended, was served on Respondent over eight years after the incident date. For the purposes of establishing a Criminal Exception, the Department cites to the Penal Law crime of Obstruction of Breathing or Blood Circulation (NYS Penal Law §121.11). The elements of that crime are that (1) with intent to impede the normal breathing or circulation of the blood of another person, the attacker (a) applies pressure on the throat or neck of the victim, or (b) blocks the nose or mouth of the victim. There is little doubt, if proven in a New York criminal court, that Respondent choked Ms. [redacted] in the manner alleged, it would constitute the crime of Criminal Obstruction of Breathing. Accordingly, the Criminal Exception has been satisfied in connection with Specification 1. It remains for this Tribunal to determine, however, whether the Department has proved by a preponderance of the evidence that Respondent engaged in the charged misconduct.

I find that the Department has failed to meet its burden of proof in connection with Specification 1. Lacking any contemporaneous documentation of the incident or Ms. [redacted] alleged injuries, the Department asks the Tribunal to make a credibility determination (Tr. 596-602). While Ms. [redacted] testified in a seemingly earnest manner at trial, her testimony when compared with her prior statements in her October 2017 family court petition, contained significant inconsistencies. Furthermore, Respondent's brother [redacted], who also testified in a seemingly sincere manner, was adamant that he never engaged in the acts Ms. [redacted] assigned to him in her description of this incident. Absent the inconsistencies in Ms.

[redacted] sworn statements, Noelson's blanket denial of any involvement in such an incident might have proved less probative due to his admittedly close and reliant relationship with Respondent. His denial in addition to Ms. [redacted] inconsistencies, however, leaves the Tribunal bereft of the quantum of proof required to find that the Department has established Specification 1 by a preponderance of the evidence.

In describing the incident at trial, Ms. [redacted] described Respondent pushing her from the front causing her to land on her back, mentioned only injuries to her neck, and explained how Respondent's brother had intervened to save her. In Ms. [redacted] October 2017 sworn petition filed in family court, however, Ms. [redacted] claimed Respondent had pushed her "violently" on the back, causing her to land face first on the bed, and that one of her injuries included "bruises on the top of her back from where he pushed her." The petition further noted "bruises under her eye from where he hit her" and made no mention of Noelson's participation or intervention.

The Tribunal is cognizant that over 8.5 years has passed between the alleged "August 2012" incident described in Specification 1 and Ms. [redacted] trial testimony. This delay might ordinarily explain some inconsistencies in a witness's memory of events nearly a decade after their occurrence. Here, however, Ms. [redacted] used vivid language ("violently") concerning the push and claimed a particularized injury associated with it. One would not expect that such a firm memory of both an act and the injury received from the act, remembered over 5 years after the incident date when she completed her sworn family court petition, would be supplanted with a very different memory at trial. The failure to mention [redacted]'s intervention in her family court petition is similarly unexpected and was also not explained in the record. Finally, the failure to describe a punch on direct examination, nor any injuries associated with it, serves to further call into question Ms. [redacted] testimony and recollection of this incident.

Based on these inconsistencies, the testimony of Respondent's brother, and the lack of any contemporaneous documents, combined with the substantial age of this claim, the Tribunal finds that Specification 1 has not been proven.

Accordingly, as to Specification 1, Respondent is found Not Guilty.

Specification 2 – November 2012 – Punch

At trial, Ms. [redacted] testified that in the "time period" of November 2012, she and Respondent became embroiled in another argument in their bedroom during which Respondent punched her in the face. Ms. [redacted] stated that as a result of the punch she had a black eye. When asked, "Do you recall anything specific about either how that day began or what the argument was about?", Ms. [redacted] replied, "Usually most of the argument is about other woman, and being disrespectful, and disrespectful in the relationship." No further details concerning the circumstances of the argument or physical altercation were provided at trial. When asked, "How did you feel in the days that followed this incident?", Ms. [redacted] replied, "in the days that follow, I thought maybe it could be he was having a bad day. So, I continued the relationship." (Tr. 56-58)

On cross-examination, Ms. [redacted] claimed that "a couple of days" after the November 2012 incident she traveled with Respondent to SUNY Downstate hospital to treat her injuries. She testified that she was unable to tell hospital staff the true source of her injuries because Respondent was with her. When asked, "[W]hen you were being treated at the hospital, was Johnson Jacques with you in your room while you were being treated?", Ms. [redacted] replied, "I don't remember." When further asked, "[A]nd did the hospital staff separate you, at all, from Johnson Jacques?", Ms. [redacted] replied, "I don't recall." (Tr. 184-86, 197)

Ms. [redacted] publicly reported this incident for the first time in her October 2017 family court petition. In the petition, Ms. [redacted] further claimed that her injuries included a

"severe headache" and "extreme emotional distress." A month later, when she was interviewed by the Department and asked to complete a narrative as part of a Domestic Incident Report concerning this incident, Ms. [redacted] wrote only the following statement: "On or about November 2012, Johnson punched me in the face, I got a black eye and severe headache and felt extremely distressed." At her Department interview, Ms. [redacted] stated that due to Respondent's presence she told hospital staff that she had fallen and hit her eye "on the door." She further stated that the injury to her eye caused her eye to become swollen shut. (Tr. 175, Dept. Ex. 10B; Resp. Exs. A-B)

Despite admitting having received medical records from SUNY Downstate for Ms. [redacted] from 2011 and entering into evidence certified medical records for hospital visits made by Ms. [redacted] to SUNY Downstate in 2013 and 2014, the Department produced no medical records in connection with Ms. [redacted] purported visit to SUNY Downstate Hospital as a result of the November 2012 incident. The Department further admitted that it had not even requested such a record from SUNY Downstate. Respondent's attorney claimed that no such records existed and that the only SUNY Downstate hospital visit of record for Ms. [redacted] in 2012 was in February 2012.[4] No subpoena for records was produced and no representative of SUNY Downstate hospital testified. (Tr. 547-54; Dept. Exs. 3-4)

Respondent testified that no such physical altercation occurred. Respondent admitted, however, that in the Fall of 2012 he and Ms. [redacted] had argued about other women in his

[4] Within the medical records entered into evidence by the Department, on stipulation, in connection with Ms. [redacted] November 2013 and July 2014 hospital visits, a spreadsheet listing Ms. [redacted] visitation history is included which appears to show all of Ms. [redacted] hospital visits to SUNY Downstate and the reasons of such hospital visits, dating back to 2011. There is no entry for a visit in November 2012. The only visit recorded in 2012 is a visit on February 28, 2012. (Dept. Ex. 3-4).

life. Both Respondent and Ms. [redacted] testified that they repeatedly argued about this same subject matter. (Tr. 56, 425, 461)

Specification 2 charges Respondent with punching Ms. [redacted] Specification 2 was served on Respondent over six years after the incident date. For the purposes of a Criminal Exception, the Department cites to the Penal Law crime of Assault in the Third Degree (NYS Penal Law § 120.00(1)). The elements of that crime are that (1) with intent to cause physical injury to another person, the attacker (2) causes such injury to the victim. "Physical injury" is defined by the Penal Law to require "impairment of physical condition or substantial pain" (NY Penal Law § 10.00(9)). Substantial pain is "'more than slight or trivial pain' but 'need not ... be severe or intense'" (*People v. A.S.*, 28 Misc 3d 381, 384 [Crim. Ct., New York County 2010], quoting *People v. Chiddick*, 8 NY3d 445, 447 [2007]). There is little doubt, if proven in a New York criminal court, that Respondent had punched Ms. [redacted] in the manner alleged, it would constitute the crime of Assault in the Third Degree. *See, e.g., People v. Williams (Richard)*, 42 Misc 3d 149[A], 149 [App. Term, 2d Dept. 2014] ["Here, defendant's intent to cause physical injury can be inferred from his act of punching the complainant in the face and head."]. Accordingly, the Criminal Exception has been satisfied in connection with Specification 2.

Nevertheless, I find that the Department has failed to prove Specification 2 by a preponderance of the evidence. Ms. [redacted] trial testimony of the purported incident was cursory, containing even less detail than the summary provided in her family court petition. Furthermore, the Tribunal was not convinced that Ms. [redacted] was certain of when this incident occurred. The Department provided no evidence, through the testimony of Ms. [redacted] or otherwise, to establish how Ms. [redacted] established that the purported incident occurred in the "time period" of November 2012. And the Department left to mere speculation

the open question as to why no medical records were produced in connection with this incident despite Ms. [redacted] testimony that she had visited SUNY Downstate Hospital to treat her injuries. Absent any further evidence to corroborate or expand upon Ms. [redacted] conclusory testimony concerning this allegation, the Tribunal lacks proof of sufficient probative value upon which to base a preponderance of the evidence finding.

Accordingly, as Specification 2 has not been proven, Respondent is found Not Guilty.

Specification 3 – September 2013-October 2013 – Threat

At trial, the only testimony Ms. [redacted] provided concerning this allegation is as follows:

> Q. Specifically in September and October of 2013, were you still living in the same apartment with the same individuals that you mentioned?
>
> A. Yes.
>
> Q. Can you tell us what, if anything, happened between you and the respondent during that period of time?
>
> A. During that period of time, I went to see a friend, and the respondent followed me unaware that I was at the friend's house. The respondent attack me when I step out. The respondent was outside of the friend's house.
>
> Q. Can I ask you, ma'am, before that happened, were there any verbal altercations or issues between you and the respondent?
>
> A. Yes, there were threats. There were arguments.
>
> Q. Can you tell the Commissioner specifically about the threats that you just mentioned?
>
> A. The respondent had threatened that he will kill himself at one point.
>
> Q. What, if anything, do you recall specifically about that? Take your time. If you need a moment, please tell the Commissioner.
>
> A. The respondent, after he find out that was I was at the friend's house, the respondent was very upset. He assumed that I was cheating. He said that I embarrass him and his family.

Q. Were there any -- during the Fall of 2013, were there any threats made to you?

A. Yes, the respondent had stated that he will -- at one point, he will kill me and himself.

Q. Was that threat made in person or over the telephone.

A. It was in person, over the telephone.

Q. There were multiple –

A. There were multiple threats, yes.

Q. Can you estimate approximately how many times?

A. I don't know exactly how many times, but there were multiple threats during that season.

(Tr. 59-61).

Ms. [redacted] publicly reported that Respondent had threatened to kill her and himself for the first time in her October 2017 family court petition. In the petition, Ms. [redacted] stated, "More than once during this time. Respondent stated that he was going to kill her, and also stated that he was going to kill himself." No further details of the threat are mentioned. Ms. [redacted] also provided no further details of this or any other threats made during this time period at her November 30, 2017, interview, or in the Domestic Incident Report she completed in connection with this allegation. No further evidence was submitted by the Department concerning this allegation. (Tr. 175, Dept. Ex. 10B, Resp. Exs. A-B)

Respondent denied that he ever threatened to kill Ms. [redacted] or himself (Tr. 464).

Specification 3 charges Respondent with threatening to kill himself and Ms. [redacted] Specification 3, as amended, was served on Respondent seven years after the incident date. In order to overcome the 18-month limitations period for the commencement of a disciplinary action established by Civil Service Law § 75(4), the Department alleges that if proven in a New York criminal court the allegations herein alleged would constitute the crime of Menacing in the

Third Degree (NYS Penal Law § 120.15). The elements of that crime are that: (1) by physical menace, (2) the perpetrator intentionally placed or attempted to place the victim in fear of death, imminent serious physical injury or physical injury. Proof of "fear of 'imminent serious physical injury' *by the victim* is required in order to exclude frivolous cases which might arise under a lesser standard" (Law Revision Commission Notes following Penal Law § 120.15 [emphasis added]). Furthermore, an essential element of the crime is "a physical act, which in and of itself placed another person in fear of imminent [] injury;" "more than mere offensive statements or verbal threats" is required. (*People v Martini*, 36 Misc 3d 729, 733 [Crim Ct, Queens County 2012]; *People v Stephens*, 100 Misc 2d 267, 268 [Nassau Dist Ct 1979]).

The charged misconduct, as alleged, fails as a matter of law, to satisfy the Criminal Exception to Civil Service Law § 75(4). Neither the charge, nor the statements made by Ms. [redacted] concerning this allegation, claimed that Respondent's alleged statement that he was going to kill Ms. [redacted] was accompanied by a physical act. Furthermore, the Department did not allege, and Ms. [redacted] did not testify, that she was in fear of *imminent* physical injury upon hearing Respondent's threat. The Department has, therefore, failed to prove the elements of Menacing in the Third Degree by a preponderance of the evidence. *Dep't of Education v. Oliver*, OATH Index No. 1889/13 (June 18, 2013) ["For the Department to prevail in its assertion that the charges are not time-barred, it must prove by a preponderance of the evidence all the elements of the crime as defined in the Penal Law."]

Accordingly, as Specification 3 has not been proven, I find Respondent Not Guilty.

Specification 4 – November 2013 – Alleged Punching and Kicking

Ms. [redacted] testified at trial that during the "time period" of November 2013 she had graduated nursing school and was working as a home health aide. Respondent continued to be upset with her after discovering her at a male "friend's house" in September/October 2013.

Respondent accused her of cheating and lying. She testified that one night, in their bedroom, they again argued about the matter and Respondent "got extremely angry" and "started hitting me in the face, the nose, all over my body," including her stomach and leg. She stated that Respondent hit her with both an open hand and closed fist. She could not estimate how many times she was hit, but remembered, "I got hit pretty bad that day." She also could not recall where she was in the bedroom at the time of the physical altercation or whether she was sitting or standing. (Tr. 61-64).

As a result of Respondent's alleged strikes, Ms. [redacted] testified that her vision was blurred, her nose bled, and there was blood "all over my scarf and coat." She testified that the same day the alleged assault took place she photographed blood on her scarf and coat, as well as on the tissues she used to wipe her nose (Dept. Ex. 1A-1C).[5] She further stated that "a couple of days later" she took photographs of her injuries in the bathroom of their shared apartment (Dept. Ex. 2A-2C). She did not produce these photographs to anyone until she met with her family court attorney in 2017. She testified that she took the photographs at the time because her vision was blurry and she thought she was going to go blind so she wanted to have the photographs "to tell the truth what happened that caused me to go blind." (Tr. 64, 72-73, 81-82, 91)

Ms. [redacted] stated that approximately one to two weeks later, on November 10, 2013, she went alone to SUNY Downstate Hospital. She stated that she delayed going to the hospital because she had "too many bruises" and was "afraid of telling them exactly what happened." She was worried that if she told them the truth, Respondent would find out and get "more upset, and angry, and hit me more." (Tr. 92, 203-204; Dept. Ex. 3).

[5] At first, Ms. [redacted] stated that she didn't know when the photographs were taken, then she stated that "maybe the pictures [were] taken on the day of the incident," but later in her testimony she estimated that the photograph of the bloody tissues was taken "an hour and a half" after the incident. (Tr. 69, 72-73, 88)

Ms. [redacted] publicly reported this incident for the first time in her October 2017 family court petition. The incident date set forth in the family court petition is September 13, 2013, as opposed to the November 2013 date in the charge. The incident is described in the petition as occurring on the same day that Respondent followed Ms. [redacted] to her male friend's house, as opposed to one to two months later, as Ms. [redacted] testified at trial. (Tr. 175, Dept. Ex. 10B)

The description of the incident in Ms. [redacted] petition claims that Respondent punched Ms. [redacted] "in the face with great force around three to four times in her face, giving her a black eye on her left eye, burst blood vessels in her right eye, and blood gushing out of her nose onto her clothes." Ms. [redacted] stated in the petition that she felt like her nose was broken. She also stated that Respondent kicked her in the stomach and punched her in the back and on her arms. She further claimed to be in "serious physical pain all over her body, face and eyes" after the incident. She stated that she thought her injuries were "permanent." (Dept. Ex. 10B)

Finally, Ms. [redacted] stated in her family court petition, that Respondent "continually attacked [her] with similar actions of punching her in the face, arms, body, and kicking her on her body, arms, and legs during these two months at the shared apartment or in his car;" further claiming that during the months of September and October 2013 "Respondent would frequently attack [her] at [their] shared apartment or inside his [redacted] car." (*Id.*)

The summary of Ms. [redacted] Department interview, which occurred on November 30, 2017, is consistent with the summary in Ms. [redacted] family court petition. (Resp. Ex. B)

In her Domestic Incident Report completed on November 30, 2017, after her interview, Ms. [redacted] wrote the following statement:

> I cannot recall the exact dates at this time, but sometime between the months of September and November 2013, Johnson punched me in the face three to four times, gave me a black eye on my left eye, bursted blood vessel on my right eye and blood was gushing out of my nose. Johnson also kicked me in my stomach and punched me my back and arms. A week or two later I went to the hospital for my injuries.

(Resp. Ex. A).

The Department entered into evidence, on stipulation, the medical records from Ms. [redacted] November 10, 2013, hospital visit. The records note that the stated reason for the visit was "eyes red, hurting a lot, sensitive to light." Upon being seen by a physician, Ms. [redacted] denied any injury and stated that her symptoms "started today" and involved the right eye. Upon being examined, the physician noted that Ms. [redacted]'s head "appeared normal to external inspection," "sclerae appear normal to inspection" (sclerae is defined as the white outer layer of the eyeball), "visual fields normal," "[p]eriorbital areas appear normal" (the periorbital area is the area of the face around the eye), "breath sounds normal," "nontender" abdomen, "no motor deficit," "no sensory deficit," and noted that her left eye appeared "normal." The only diagnosis provided is "[i]nternal stye with erythema" (a stye is an infection of the oil gland of the eyelid and erythema is skin redness). Ms. [redacted] was prescribed an "Erythromycin" ointment, which she was instructed to "apply 0.5 inch to inner aspect of the lower lid on the affected eye." (Dept. Ex. 3)

Respondent denied that this incident ever occurred (Tr. 426).

Specification 4 charges Respondent with punching and kicking Ms. [redacted] Specification 4, as amended, was served on Respondent over seven years after the incident date. For the purposes of establishing a Criminal Exception, the Department cites to the Penal Law crime of Assault in the Third Degree (NYS Penal Law § 120.00(1)). There is little doubt, if proven in a New York criminal court, that Respondent had punched Ms. [redacted] in the

manner alleged, it would constitute the crime of Assault in the Third Degree. Accordingly, the Criminal Exception has been satisfied in connection with Specification 4.

Nevertheless, I find that the Department has failed to prove Specification 4 by a preponderance of the evidence. The hospital records did not corroborate any of Ms. [redacted]s purported injuries. The medical records, which involved a thorough examination of Respondent's right eye, and a diagnosis of a stye on her lower eyelid, do not corroborate a burst blood vessel in the whites of her right eye, as Ms. [redacted] testified to, and which she claimed she photographed "a couple of days later."[6] The records further state that her left eye appears normal, which does not corroborate the black eye she claimed under her left eye. Finally, the records report that Respondent's head appears normal and her abdomen is described as "nontender," which does not corroborate Ms. [redacted]s statement of being punched with "great force" by Respondent three to four times in her face and punched/kicked in her stomach. (Tr. 135-36, 586-87; Dept. Ex. 3)

Furthermore, the statement Ms. [redacted] provided in her family court petition was both far more detailed than the cursory description Ms. [redacted] provided at trial and contained significant inconsistencies in connection with the details Ms. [redacted] did remember at trial. Ms. [redacted] stated at trial that Respondent had followed her to a friend's house in September/October 2013 and that the assault occurred in November 2013 because "he was still not over [] finding [her] at the friend's house;" yet, in her petition and at her Department interview, she placed the assault as occurring on the same day as Respondent having followed

[6] The images produced at trial were of poor quality and the Department was unable to produce the original digital images taken with Ms. [redacted] iPhone. Despite testifying that she no longer possessed the iPhone on which the photographs were taken, Ms. [redacted] testified that she had emailed the original images to her attorney, with whom the Department represented they were in contact, and from whom the Department had obtained substantial discovery (Tr. 135-36, 586-87). The Department could not explain why it was unable to retrieve the original images from Ms. [redacted] attorney. An exact date on which the digital images were taken could not be established.

her and discovered her at her male friend's house. At trial, Ms. [redacted]'s description of the assault on direct examination did not include any testimony concerning Respondent kicking her. Rather, it was not until cross-examination when confronted with statements Ms. [redacted] made in her family court petition that Ms. [redacted] testified to a kick. Furthermore, on direct examination, Ms. [redacted] claimed she was punched in the stomach, while in the petition she claimed she was kicked in the stomach. Finally, in her petition, she claimed that these attacks were ongoing and repeated throughout September/October 2013; yet, she did not make these claims at trial.

The substantial inconsistencies in the record undercut the seemingly candid manner in which Ms. [redacted] testified and the Department made no effort to bring the inconsistencies to Ms. [redacted] attention to seek an explanation from her. Lacking both the detail and clarity necessary to establish that the charged incident occurred, I find that the Department has failed to prove the misconduct charged by a preponderance of the evidence.

Accordingly, as Specification 4 has not been proven, Respondent is found Not Guilty.

Specification 5 – July 2014 – Push

In 2014, Ms. [redacted] learned she was pregnant with her daughter, who was born in January 2015. At trial, Ms. [redacted] testified that, while pregnant in July 2014, she and Respondent had a "debate," the topic of which she did not remember, but she remembered that Respondent became upset and pushed her shoulder, causing her back to hit a wall. The push occurred in the "late evening" inside their shared apartment near the "outer door." Ms. [redacted] claimed that, as a result of the push, she suffered abdominal pain and vaginal bleeding. She sought treatment for her injuries at SUNY Downstate Hospital. When asked why she did not tell medical staff about what had happened to her, she replied "because [Johnson] had

said that they would never believe me. He's a cop. He would never get in trouble." (Tr. 94-97, 225)

Both in the summary of Ms. [redacted] interview and in the narrative portion she completed as part of the Domestic Incident Report, Ms. [redacted] stated that she could not remember when this incident occurred, but that it was sometime between May 2014 and January 2015. When asked, at trial, how she had subsequently determined that the incident occurred in July 2014, Ms. [redacted] explained that she was "supposed to give a specific date," so she went back to her text messages and was able to narrow it down. She stated that she did not save these text messages or produce them to the Department.[7] (Tr. 217-18, Resp. Exs. A-B)

In Ms. [redacted] October 2017 family court petition the only description of this incident is as follows:

> From May 2014 until January 2015 Petitioner was pregnant with the parties' child. At one point during the pregnancy at the shared apartment, Respondent pushed Petitioner with great force on her shoulder, causing her to fall into the wall behind her and hit her back on the wall. This made Petitioner afraid for her safety and that of her unborn child.

The petition does not specify any injuries or that Ms. [redacted] sought medical attention.[8] (Dept. Ex. 10B)

In a related Domestic Incident Report (DIR) prepared in November 2017, Ms. [redacted] entire narrative reads as follows:

> I can't recall the exact date but sometime during the month[s] of May 2014 until Jan 2015, while I was pregnant with our child, Johnson pushed me hard on the shoulder causing me to fall into the wall behind me and hit my back on the wall.

[7] Ms. [redacted] admitted that she preserved other text messages for use in family court (Tr. 218).

[8] In the petition, Ms. [redacted] notes injuries and hospital visits in connection with other alleged incidents of abuse.

The DIR does not specify injuries or note that Ms. [redacted] sought medical treatment. (Resp. Ex. A)

The Department entered into evidence, on stipulation, medical records from a July 1, 2014, visit by Ms. [redacted] to SUNY Downstate Hospital. The document records that Ms. [redacted] arrived at 3:56 a.m. and departed at 6:41 a.m. The records note that Ms. [redacted] complained of [redacted] The physician notes state, "patient has [redacted] is documented as reporting, [redacted]. The hospital records noted that she was treated for [redacted] and was discharged with instructions [redacted]' (Dept. Ex. 4)

Respondent denied pushing Ms. [redacted] with "great force" into a wall when she was pregnant. Respondent did remember, however, that on one occasion:

> I do not recall the time, date. I remember that she was pregnant, and she woke up in the middle of the night. It was about two, three in the morning. She woke up to pee, and she told me, "Oh, I am bleeding." I said, "Okay. Is it heavy," and she showed me. I said, "Okay. I take you. I think you should go to the hospital." She said, "Maybe it's not necessary." I said, "You're pregnant. You're bleeding. The hospital maybe it would be a good choice," and she need to go the hospital. I drove her to the hospital.

(Tr. 426-27, 474-75).

At trial, Respondent claimed that this was the only time that he went to the hospital with Ms. [redacted] During cross-examination, however, Respondent admitted that at one of his two Department interviews when asked how many times he had "escorted [her] to the hospital . . . for injuries she sustained," he answered, "I escorted her to the hospital twice during our

relationship." He established, at the interview, that the first time was at the beginning of their relationship, in 2010, when she called him to tell him she had fallen and he "picked her up [and] brought her to Jamaica Hospital." The second time he could not establish a date for, but he remembered that "she came home" and one of her knees was bleeding and swollen, so he brought her to the hospital, either "Downstate or Kings." At trial, however, Respondent clarified that he had misspoken at his Department interview when he stated he had escorted her twice because as to the first hospital visit he had only picked her up from the hospital. (Tr. 476-86)

Respondent admitted, however, that he did not tell Department investigators about the time that he took Ms. [redacted] to the hospital because she was experiencing vaginal bleeding. Respondent further admitted that he argued with Ms. [redacted] when she was pregnant because she thought he was cheating. (Tr. 485-87)

Specification 5 charges Respondent with pushing Ms. [redacted] into a wall. Specification 5, as amended, was served on Respondent over six years after the incident date. For the purposes of the Criminal Exception, the Department cites to the Penal Law crime of Assault in the Third Degree (NYS Penal Law § 120.00(1)). There is little doubt, if proven in a New York criminal court, that Respondent had pushed Ms. [redacted] a pregnant woman, with "great force" into a wall, and caused Ms. [redacted] vaginal bleeding as a result, it would constitute the crime of Assault in the Third Degree (*People v. Kersh*, 980 N.Y.S.2d 277 [Crim Ct NY County 2013] [intent to injure could reasonably be inferred where defendant pushed the complainant against a mirrored wall with sufficient force to shatter the mirror, since defendant did so after approaching the complainant in a "threatening manner" and "shouting" at him]; *People v. Dreyden*, 903 N.Y.S.2d 657 [App. Term 2d Dept., 11th & 13th Dists 2010] [information alleging that defendant pushed complainant to the ground and took her car keys sufficiently alleged intent to injure; it could "rationally be inferred that defendant intended to cause physical injury as a

means of achieving his ultimate goal of obtaining the keys"]. Accordingly, the Criminal Exception has been satisfied in connection with Specification 5.

Nevertheless, I find that the Department has failed to prove Specification 5 by a preponderance of the evidence. The Tribunal does not credit Ms. [redacted] version of events as established in the record. If Ms. [redacted] believed that she had been injured or visited a hospital in connection with the alleged push, it is unlikely that she would have failed to include those facts in her family court petition, Department interview, or Domestic Incident Report. Furthermore, it is odd and unresolved in the record that in these documents Ms. [redacted] consistently stated that she is unsure of the date of this incident, only that it occurred sometime during her pregnancy, but somehow after making these formal reports she is able to "narrow it down" based on text messages neither inspected by the Department nor produced for Respondent's inspection.

Furthermore, no record was made, at trial or otherwise, concerning the timing of Ms. [redacted] hospital visit in relation to the alleged push. Ms. [redacted] never testified or stated in any of her admitted prior statements that she sought medical treatment the same night as the injury. The Tribunal also finds it curious that when asked how she narrowed down the date of the incident Ms. [redacted] claimed she relied on text messages to search for an approximate date ("July 2014") rather than relying on a hospital record that established an exact date of treatment. Finally, the records of Ms. [redacted] July 1, 2014, hospital visit, noting treatment for "vaginal bleeding" associated with pregnancy and intercourse, are not probative of the charged misconduct.

Too many unanswered questions and inconsistencies exist in connection with this specification to support a finding that the weight of the evidence preponderates in the Department's favor.

Accordingly, as Specification 5 is not proven, Respondent is found Not Guilty.

Specification 6 – July 27, 2015 – Display of Firearm

In 2015, Respondent purchased a two-family home, into which he, his mother, two of his siblings, and Ms. [redacted] moved. Respondent and Ms. [redacted] lived on the second floor and Respondent's mother, sister, and brother, on the first floor. (Tr. 98-99, 337-38, 355, 525)

At trial, Ms. [redacted] testified that on the evening of July 26, 2015, she and Respondent argued "again, about women" and "him being disrespectful." Respondent told her that "[h]e will not change and I can take it or leave it." Ms. [redacted] told him, "Well, I'm leaving." The following day, when she was leaving work, she saw Respondent outside her place of work in his car. At first, she ignored him and kept walking, but when he said, "Get in the car," she decided to comply because she did not want to "cause a scene." Once she entered the car, Respondent demanded to know when she was moving out. Ms. [redacted] replied that she "wasn't ready" since she "didn't have all my things in order," so she could not say when she would be moving. Ms. [redacted] then fell asleep. (Tr. 99-102)

When they were close to their shared apartment, Respondent woke her up and demanded to know what her plans were. She told him that when she knows, she will tell him. Respondent replied that he would make it easier for her and said that he would kill their daughter, kill her, and kill himself. He then began driving recklessly, including running red lights. (Tr. 104)

When they arrived at their shared apartment, Respondent parked in the driveway and jumped out of the car, running up a long exterior staircase to their second floor home. Ms. [redacted] jumped out and ran behind him. As he ran up the outside stairs, she observed Respondent remove his firearm, hold it in his right hand, and open the door. Respondent's mother met him in the hallway and asked, "What's going on?" While he was talking to his

mother, Ms. Jean-Pierre ran past Respondent to their bedroom, grabbed her daughter, ran down an interior staircase to the first floor, and ran out of the house. She ran across the street and called a friend to pick her up.[9] (Tr. 104-107)

Her friend took her to the grocery store so she could grab milk for her daughter and then drove her to her friend's home. Ms. [redacted] stayed the night. In the next day or two, Respondent came to her friend's home and told her friend that he wanted to talk to Ms. [redacted] The friend did not permit him entry and told him that he needed to go home. Respondent then called their priest and Ms. [redacted]'s mother, both of whom told her that she had nowhere to go, no other choice, and that Respondent was very apologetic. The following day, Ms. [redacted] moved back in with Respondent, but stayed in a separate bedroom. Approximately a year later, in July 2016, Ms. [redacted] moved out, leaving her daughter with Respondent. (Tr. 108-110)

Ms. [redacted] family court petition and the Domestic Incident Report associated with this incident are consistent with her trial testimony; except that, Ms. [redacted] stated in her petition that, after running outside, Respondent followed her outside with the gun,[10] causing her to run down another street, and that Respondent then got into his car and went looking for her. (Dept. Ex. 10B, Resp. Ex. A)

In the summary of her Department interview, Ms. [redacted] is recorded as saying that as she jumped out of the car, she observed Respondent pull out his gun and point it at the front door to their home. As Ms. [redacted] got to the front door, Respondent's mother was standing at the front door blocking it. Ms. [redacted] ducked under Respondent's mother and then ran upstairs to the second floor. After running out of the house with her daughter, Ms. [redacted]

[9] Ms. [redacted] provided the name of her friend on the record.

[10] The petition does not specify whether the gun was holstered, in Respondent's hand, or somewhere else.

stated that she hid around the corner and observed Respondent driving his car. She then called her friend. Thereafter, Respondent called a "family meeting" with their pastor, during which Respondent agreed to "change" if she moved back in, and Ms. [redacted] agreed she would move back in if she did not have to sleep in the same bedroom as Respondent. Ms. [redacted] stated that, at the time, their daughter was only nine (9) months old and she had nowhere else to go because she did not have family "here" and she could not afford her own place with the baby. At trial, Ms. [redacted] stated that she did not recall where Respondent pointed the gun. (Tr. 238, Resp. Ex. B)

Ms. [redacted] testified to two conversations with Respondent, one in-person and one over the telephone that she recorded with her cellphone (Dept. Exs. 6A-B, 7A-B). She did not know the exact date the audio recordings were made but estimated they were recorded on two Sundays in the summer of 2017. Much of what Respondent says in the recordings is in a foreign language (Creole) and was not translated by the Department; nevertheless, there are key portions where Respondent speaks in English that are transcribed. Respondent stipulated that the recordings contain his voice and that he engaged in the conversations captured in the recordings. (Tr. 110-25, 144-45, 281-82)

In the first recording, which Ms. [redacted] said was recorded after 7 p.m., her daughter can be heard crying and Ms. [redacted] is heard attempting to comfort her. Ms. [redacted] then begins and maintains a lengthy verbal argument with Respondent in the presence of her daughter. She is heard stating, "At least she cry in front of you, so you have nothing to say?" Respondent replies, "You think I give a shit?" Ms. [redacted] replies, "I know you don't give a shit." She continues, "She needs more time with her mother because every Sunday when I drop her off, whoever pick her up, she cry. Her grandmother pick her up, she cry. [redacted] pick her up, she cry. . . . You don't care. It's all about you. It's not about you anymore." Respondent replies,

"Oh, that's, that's not true. . . . That's not true. . . . What I don't care about is I don't care whether you are [unintelligible] or not. That's what I don't care about." At one point, Respondent states, "To you I'm nobody. . . . That nobody . . . . was one day bad to you." Referring to their daughter, Ms. [redacted] states, "You didn't even want her. You didn't even want her. Let's not forget that. You didn't even want her;" Respondent asks her to sit down. (Dept. Ex. 6A-B)

Later during the recording, Ms. [redacted] and Respondent can be heard repeatedly referencing the "gun incident." The first reference is elicited when Respondent tells Ms. [redacted] that "[t]he entire house was on video. . . . One day [our daughter] will have interest to watch every single piece of it. . . . I transfer everything on this CD on the hard drive." Ms. [redacted] replies, "I also hope in that copy, [our daughter will] have a copy of you pulling out a gun, a gun on me and her." Respondent continues, "It's not even safe in my house. It's safe in the bank."[11] During a subsequent portion of the audio, Ms. [redacted] asks, "Why, why you kick me out when you knew that I had nowhere to go." Respondent replies, "You asked to move. You, you asked to leave." Ms. [redacted] replies, "I asked to leave the relationship because of the beating, the gun incident. My soul wasn't there anymore." Later, Ms. [redacted] asks, "What did you say after the gun incident? . . . You would let everything go 'cause it's me, you, and [our daughter] now. . . . You play me for a fool." Respondent replied, "You said I play you. . . . I totally could say the same thing for you. . . . Could I said that you play me to get better and then you leave?" In another portion, Ms. [redacted] states, "Me and you . . . It's done. And you knew that from the day that you pull out the gun." Respondent replied, "Well, why didn't you leave at that time? Why?" Ms. [redacted] replied, "Why did I leave? . . . [our daughter] was nine

[11] At trial, Respondent explained that all of the video recordings he had were lost in a "terrible flood in my house" (Tr. 527).

months. . . . you promised, again I fall again for it." Respondent replied, "I didn't fuck up . . . . [A]fter that whole gun incident, I did not fuck up. The only thing I did that you wasn't happy about was when you asked me do you still talk to Sophia and I said yes. . . . [T]hat's the only thing you have on me after that whole gun incident." (*Id.*)

In a separate recording of a telephone call between Ms. [redacted] and Respondent, Ms. [redacted] can be heard asking Respondent, "When you used to beat me, did I ever call the cops on you? Did I ever do anything on you? What did I do to you?" Respondent replied, "Daphney, I'm not gonna talk about this." She continues, "When you used to beat me, when you pull out the gun out on me Johnson, did I call the cops on you? Or your mom and my mom apprised me, no, don't do anything because at the end of the day you have a child with Johnson. He's gonna lose everything." Respondent replies, "We both know, we both know, what we did to each other." Ms. [redacted] replies, "I didn't do anything to you." (Dept. Ex. 7A-B)

Ms. [redacted] further testified about a text message conversation between her and Respondent, dated August 11, 2015, at 6:21am, in which the following exchange occurs:

Ms. [redacted]	Left for work
Respondent:	ok get there safe
Ms. [redacted]:	Thanks
Respondent:	thank u for everything, especially for not getting me lock up. u are a humanist in your own way
Ms. [redacted]	Hmmmm… Ur welcome Johnson…
Respondent:	hmmmmm

Ms. [redacted] stated at trial that Respondent is referencing the "gun incident" when he thanks her for "not getting me lock up."

At trial, Respondent called his mother to testify. She testified in Creole via a certified Creole interpreter that she saw Ms. [redacted] every day while they lived together and had never observed any injuries, never observed them run into the home, never blocked Respondent from entering, and never saw Respondent display a firearm. Respondent's mother further claimed that

she did not know what Respondent and Ms. [redacted] would argue about and that she would not understand them, in any case, because they spoke in English.

During Respondent's testimony he denied that this incident occurred. Respondent admitted, however, that on July 27, 2015, Ms. [redacted] accused him of pointing a gun at her. He stated that the so-called "gun incident" referred to an incident the same day when he went into the kitchen to put his gun in his gun safe. At the time, Ms. [redacted] was cooking dinner in the kitchen. He claimed that they had been arguing the day before and when he went to put his gun in the safe that day she turned around and said to him, "You put your gun on me." (Tr. 423-24, 431, 492)

Respondent admitted that he did not mention this explanation of the "gun incident" to investigators at his Department interview. At trial, he further explained that in the text message he wrote to Ms. [redacted] thanking her for not getting him "lock[ed] up," he was just "thanking her for not making a false allegation." Respondent also explained that in the recorded phone calls he does not dispute her version of the "gun incident" because by that time he "just got tired of correcting her" and "to prevent argument." (Tr. 431, 499, 514, 530)

Specification 6 charges Respondent with displaying a firearm during an argument with Ms. [redacted] Specification 6 was served on Respondent over three years after the incident date. For the purposes of establishing a Criminal Exception, the Department cites to the Penal Law crime of Menacing in the Third Degree. The elements of that crime are that: (1) by physical menace, (2) the perpetrator intentionally placed or attempted to place the victim in fear of death, imminent serious physical injury or physical injury. There is little doubt, if proven in a New York criminal court, that Respondent had threatened Ms. [redacted] and her daughter's life and then pulled out a firearm, it would constitute the crime of Menacing in the Third Degree. Accordingly, the Criminal Exception has been satisfied in connection with Specification 6.

The Department has proved Specification 6 by a preponderance of the evidence. Ms. [redacted] testified in a detailed and credible manner concerning this incident and her version of events was also supported by contemporaneous text messages and subsequent recordings of conversations in which she references a "gun incident," which Respondent also acknowledges.

That the "gun incident," as Respondent would have it, referred to a time when he innocently placed his gun into a safe and Ms. [redacted] falsely accused him of pointing a gun at her is not credible. Despite numerous opportunities to do so in their recorded conversations, Respondent does not deny that the "gun incident" was a major event that warranted conversations about resetting their relationship. Respondent is heard stating during the in-person recording, "[A]fter the whole gun incident I did not fuck up." A reasonable interpretation of this statement is that Respondent did "fuck up" during the "gun incident." And that the gun incident was a major event is corroborated by Respondent's text message, fifteen days later, in which he thanks Ms. [redacted] for not getting him locked up.

The testimony of Respondent's mother was unpersuasive. Nearly all of her answers concerning Respondent and Ms. [redacted] relationship were vague or nonresponsive. She evidenced a clear motive to testify in a manner protective of her son and admitted that she relied on Respondent for shelter and occasional financial assistance. It was not credible that she did not know the subject of arguments between Respondent and Ms. [redacted] because "they spoke English." In the recordings of arguments between Respondent and Ms. [redacted] in evidence they are heard speaking in both English and Creole to each other. (Tr. 327, 334, 337-38, 353-54, 356, 358-59, 363, 367-68; Dept. Ex. 6A-B, Dept. Ex. 7A-B).

Given Ms. [redacted] credible testimony and the ample corroboration in the record, the Tribunal finds that the Department proved by a preponderance of the evidence that a verbal

dispute occurred in which Respondent threatened to kill Ms. [redacted] and that a short time later Respondent displayed his firearm.

Accordingly, as to Specification 6, I find Respondent Guilty.

Specification 7 – Between January 2016 and October 2017 – Threats

Specification 7 charges Respondent with threatening Ms. [redacted] "several times" between January 2016 and October 2017. Asked to produce a Bill of Particulars, the Department responded by claiming that the threats were both in-person and over the phone and included the following threats:

> I will kill you, I am a Police Officer, I will never be punished because I know how to act and play the system. I will assault you and say I wasn't myself at the time, I will say I thought you were someone else, then I won't go to jail just a mental hospital. You are nothing but a whore and I will kill you and then kill myself. You are a drug user and a prostitute, good luck bringing me to court.

No dates were provided as to when each of these threats were made and no effort was made to describe whether these threats were made together or separately.

At trial, Ms. [redacted] did not provide any testimony concerning any threats made by Respondent between January 2016 and October 2017 wherein he threatened to kill her, assault her, or even where he claimed that she was a drug user or a prostitute. When asked to describe the threats between January 2016 and October 2017, Ms. [redacted] replied that Respondent threatened her with never being able "to have" her daughter again and that it would be over his dead body that she would get custody of their daughter. No further threats during this time period were testified to. (Tr. 143-47)

Respondent denied that he ever threatened to kill Ms. [redacted] (Tr. 426). The Department did not ask Respondent if he ever threatened to assault her or whether he had accused her of being a drug dealer or a prostitute.

For the same reasons set forth in this Tribunal's analysis as to Specification 3, the instant specification fails to meet the requirements of the Criminal Exception. None of the allegations establish a "physical act" required to establish the crime of Menacing in the Third Degree. The Department has, therefore, failed to prove the elements of Menacing in the Third Degree by a preponderance of the evidence. *Dep't of Education v. Oliver*, OATH Index No. 1889/13 (June 18, 2013) ["For the Department to prevail in its assertion that the charges are not time-barred, it must prove by a preponderance of the evidence all the elements of the crime as defined in the Penal Law."]

Accordingly, as Specification 7 has not been proven, Respondent is found Not Guilty.

PENALTY

In order to determine an appropriate penalty, this tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history was also examined (*see* 38 RCNY 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent has been found guilty of Specification 6, charging him with displaying a firearm during an argument with Ms. [redacted] For an act of domestic violence involving a menacing with a firearm, the Disciplinary Guidelines provide for a presumptive penalty of Termination and a mitigated penalty of Forced Separation. The Department Advocate has recommended Termination.

Respondent is a twelve-year member of the service with no formal disciplinary history. He is rated as highly competent and "exceeds expectations." Despite Respondent's positive

performance history with the Department, in the view of this Tribunal, the imposition of a mitigated penalty would not be appropriate here.

Accordingly, consistent with the Disciplinary Guidelines it is recommended that Respondent employment with the Department be Terminated.

Respectfully submitted,

Josh Kleiman
Assistant Deputy Commissioner Trials

DISAPPROVED
JAN 14 2022
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER JOHNSON JACQUES
TAX REGISTRY NO. 947923
DISCIPLINARY CASE NO. 2018-19665

Respondent was appointed to the Department on January 14, 2009. On his three most recent annual performance evaluations, Respondent received a rating of "Exceeds Expectations" for 2020, a rating of "Meets Standards" for 2019, and a 4.0 rating of "Highly Competent" for 2018.

Respondent has no disciplinary record. In connection with the instant matter, Respondent was placed on modified status on November 30, 2017 and remains modified to date.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials